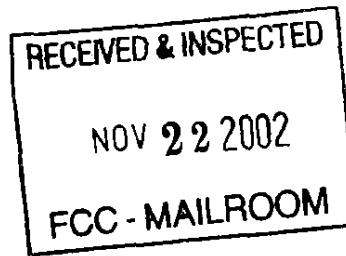


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November 21, 2002

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DOCKET FILE COPY ORIGINAL

Office of the Secretary
Federal Communications Commission
9300 East Hampton Drive
Capitol Heights, MD 20743

Re: Enclosed comments

Dear Ms. Dortch:

Enclosed please find and original and four copies of the comments of American Business Media in FCC rulemaking Docket Nos. GC02-278 and CC 92-90 (Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991).

Very truly yours,

Thompson Coburn LLP

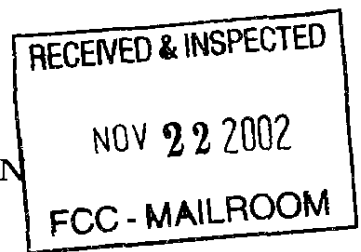
By

David R. Straus

Enclosures

No. of Copies to be 0+4
LAW OFFICE

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**



In the Matter of)	
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	CC Docket No. 92-90

COMMENTS OF AMERICAN BUSINESS MEDIA

Pursuant to the “Notice of Proposed Rulemaking and Memorandum Opinion and Order” released September 18, 2002 and published in the *Federal Register* on October 8, 2002, American Business Media hereby submits the following comments.

Introduction

American Business Media was founded in 1906 and is the industry association for business-to-business information providers. Its members produce magazines, trade shows, CD-ROMS, web sites and other products that enhance their primary mission: to disseminate information that is vital to American industry and professions. Its 222 members publish more than 1,200 periodicals, maintain roughly 1,350 websites and reach nearly ninety million professionals. Some of its member publications, such as *Advertising Age*, *Industry Week* and *Oil & Gas Journal*, are relatively well known, while others are typically known only within the professions and industries they serve.

American Business Media has a substantial interest in this proceeding, because its members in recent months have faced what is growing into a barrage of threatened lawsuits by a small number of plaintiff's lawyers who appear to be developing a cottage industry out of locating faxed advertisements and threatening the sender with a lawsuit—and even a class action—if the sender fails to pay \$1,500 per advertisement. In the case of these threats to American Business Media members, they are undeterred by evidence that the recipient is a subscriber to the magazine sending the fax (and thus that there is an “established business relationship”) or that the recipient expressly requested the information.

Although American Business Media strongly believes that the fax provisions of the TCPA are unwise, unnecessary and, especially as applied to the press, unconstitutional, it recognizes that this issue should be pursued in other fora.¹ We will thus limit our comments here to one matter raised in the Notice of Proposed Rulemaking: the status of the “established business relationship” exception crafted by the Commission. Before addressing the matter in detail, however, American Business Media believes it appropriate to describe both the manner in which the business-to-business press operates and the nature of the threatened lawsuits against its members.

¹ On October 15, 2002, American Business Media has filed an *amicus* brief with the United States Court of Appeals for the Eighth Circuit in State of Missouri, et al. v. American Blast Fax, Inc., et al., Nos. 02-2705 and 02-2707.

Most specialized business publications do not charge for subscriptions that are requested by readers whose demographics (primarily occupation) suggest an interest in the publication's subject matter. Publishers of such magazines seek to develop a subscriber base of persons involved in the profession or industry covered by the publication (who thus benefit from the magazine content and present an attractive audience for advertisers), and they do so by exchanging the subscription for the necessary demographic information from qualified readers. The United States Postal Service requires that these publishers have written proof, re-confirmed at least every three years, that at least 50% of their distribution goes to subscribers who have "paid for or requested" the publication if they are to pay the Periodicals postage rate.² It is thus crucial to their ability to use the lower Periodicals postage rates that these publishers receive and maintain hard-copy proof of a "request" from readers. To obtain such proof, many publishers send facsimiles of the appropriate signature form to renewal subscribers.'

Buildings magazine, published by Stamats Conimunications, Inc. ("Stamats") in Cedar Rapids, Iowa, is a typical American Business Media member. *Buildings* has a circulation of about 57,000 copies per month to subscribers in all fifty states (and a small portion in other countries). It covers

² See 39 C.F.R. pt. 3001, subpt. C, App. A, §§ 412.31 & 413.41. This proof is a prerequisite to qualification for the lower postal rate for periodicals.

³ Many publishers also send **faxes** to prospective subscribers, although in most of these situations, there is admittedly no "established business relationship" with the potential subscriber.

topics such as space planning, energy efficiency and, with recently heightened concern, building security and emergency planning. Its July 2002 issue focused on the “unsung heroes of September 11,” the building personnel who saved lives and in some cases sacrificed their own. Readers of *Buildings*, like readers of all business-to-business periodicals, frequently report that the information it contains is vital to their industry and that both the editorial and the advertising content provide reliable and essential information they need to perform their jobs.

Unlike some consumer magazines, with circulations in the millions, publishers of magazines such as *Buildings* are limited to a small universe of potential readers and advertisers. They cannot communicate with them through the mass media (such as a television ad for *Sports Illustrated*), and they have found that targeted fax communication is one of the most effective, and cost effective, ways to seek renewal “request” forms from existing subscribers, and to communicate with Subscribers about such related matters as industry trade shows. Stamats, for example, historically sought renewal requests from subscribers with a “cover wrap” on the publication and followed up as needed with a fax. But then it was threatened with (and paid to settle) a lawsuit under the Telephone Consumer Protection Act (“TCPA’)).The publisher’s defense, that the fax in question was permissible because it was sent to an existing subscriber with whom the publisher had an “existing business relationship,” was countered by the recipient’s claim that the TCPA contains no pre-existing business relationship exception and that the FCC’s “existing business

relationship” regulation is *ultra vires*. Other American Business Media members have faced and are facing similar threats and suits.⁴

In response to TCPA threats and suits, Stamats has been forced to modify the way it does business. It has stopped all faxes into the hotbeds of TCPA lawsuits, such as California and the St. Louis area. **As** a result, Stamats and many other publisher members of American Business Media will obtain fewer subscribers, will spend more money to communicate *with their own readers*, and will fail to maximize their enormous potential to inform the leaders and managers of America’s businesses — from the farmers and industries in the heartland of the Midwest, to the entertainment industry in California, to the garment industry in New York. More importantly, many potential readers will be deprived of an important source of information about their industry, trade or profession.⁵

⁴ In one recent and particularly egregious example, a subscriber met a publisher’s representative at a trade show related to the publication and **asked** that representative to send him information on future trade shows. The representative did so, by fax, and months later the publisher received a threatening letter demanding the payment of \$1,500 for a wilful violation. The plaintiff’s attorney was not deterred by the fact that there was an existing business relationship and that the information had been requested. He also threatened a class action. Faced with either paying the money or spending many times that to defend a groundless lawsuit in another part of the country, the publisher had no choice but to pay the \$1,500. There are many other equally egregious examples.

⁵ Studies performed by and for American Business Media and its members consistently show that both editorial and advertising content of business-to-business publications are crucial to decision makers at all levels of American commerce. For example, nearly 90 million readers are reached by American Business Media member business-to-business publications, which serve 181 industries. Forty-four percent of business-to-business publication readers consult one daily. Readers rank business-to-business publications as the single most credible source of business information (ranking these publications higher than the *Wall Street Journal*, *Forbes*, *Fortune*, *Barrons* and *The Economist*). Moreover, 95% of the readers find that advertising is an important part of the overall magazine.

The members of American Business Media have important messages, including advertising, for their readers and potential readers. They have found that for certain purposes the use of faxes is, if not essential, highly desirable to their business. Yet the broad reach of the TCPA, combined with a plethora of threats of lawsuits and even class actions, has begun to erode the use of faxes *even to communicate with subscribers* and to inhibit these communications at the core of First Amendment purposes.⁶

Specific Comments of American Business Media

The Commission's Notice (¶ 7) concludes that despite the statutory ban on the faxing of unsolicited advertisements, they have "proliferated" and caused inconvenience, disruption and even [on the basis of one unlikely anecdote] "serious implications for public safety." American Business Media can produce no facts in refutation of this claim, just as the Commission can produce no facts in support of it. The statement (¶ 8) that the Commission received 2,100

⁶ As stated above, American Business Media will not here seek to convince the Commission that the fax provisions of the TCPA do not meet the Central Hudson test. We note, however, that the application of a law designed to stop indiscriminate "blast" faxing in fact has a much broader reach. When applied to the press, even beyond communications to those with whom there is an established business relationship, it clearly treads on press freedoms protected by the First Amendment. Supreme Court precedent is clear that the First Amendment covers sales and circulation of magazines as well as the mere printing of them; it directly follows that any attempt to restrict or restrain direct-to-person solicitations for magazine subscriptions must be subjected to strict First Amendment standards, not lesser commercial speech standards. Freedom of press does not stop at the pressroom door. Rather, in Lovell v. City of Griffin, 303 U.S. 444 (1938), the United States Supreme Court held that a municipal ordinance restricting *circulation* of publications "strikes at the very foundation of freedom of the press by subjecting it to license and censorship." *Id.* at 451. The Court recognized that "[l]iberty of circulating is as essential to that freedom as liberty of publishing; indeed without the circulation, the publication would be of little value." *Id.* at 452. . See also Substitutes United For Better Schools v. Rohter, 496 F. Supp. 1017, 1020 (N.D. Ill. 1980) [newspaper sales held inextricably bound up with the expressions in the newspaper itself and hence protected by the First Amendment].

complaints in 2001 hardly evidences a national outcry, especially given the publicity that this issue has received and in contrast with the reported 162,000 hits received ~~in~~ *a single month* on the Commission's web page regarding telemarketing calls

In any event, however, there has been no claim made here or elsewhere that targeted faxes to those known to be interested in the subject matter, as opposed to indiscriminate blast faxing, contribute to the public's unrest. A *fortiori*, the Commission cannot reasonably contend, nor can anyone else, that the existence of the established business relationship defense has been or will be a contributor to this perceived problem.

American Business Media recognizes, as does the Commission (§ 34), the ambiguities in the present definition of "established business relationship." American Business Media submits that the ease with which a person can terminate an "established business relationship" argues for the broadest possible definition thereof. A communication stating "do not send faxes" or "do not call me" is all that it takes. Surely, where the sender of a fax has good reason to believe that a business relationship exists, it is far better [and more in keeping

⁷ Similar vagueness permeates the TCPA, as the Commission's Notice elsewhere recognizes. The breadth and vagueness of the TCPA, and its lack of any exemption for constitutionally protected facsimiles such as American Business Media members' subscription and renewal solicitations, necessarily sends a chill over and inhibits these activities. Speiser v. Randall, 357 U.S. 513, 526 (1958) (vague inhibitory regulations offend First Amendment because of their chilling effect; "[w]hen one must guess what conduct or utterance may lose him his position, one necessarily will 'steer far wider of the unlawful zone....'"); United States v. Robel, 389 U.S. 258, 265 (1967) ("[P]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms") [quoting National Ass'n for the Advancement of Colored Persons v. Button, 371 U.S. 415, 438 (1963)]; New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (threat of large civil penalties imposes significant chill on free speech).

with the First Amendment) to permit a single fax that might be unwanted than to prohibit all fax communications.

Specifically, the Commission seeks comment (§ 38) on the question of when the providing of a fax number reasonably represents the granting of permission to use that fax number for the transmission of a faxed advertisement. American Business Media recognizes that there can be legitimate differences of opinion concerning the example of fax numbers in published directories. American Business Media's bias in favor of more communication, not less, persuades us that those willing to make fax numbers available in directories released to the public do so with an expectation that such fax numbers will be used, and not just for "political speech."

Irrespective of the Commission's views on this question, however, American Business Media submits that when an individual (or a business) specifically and voluntarily provides a fax number to another business, the business receiving the fax number should certainly be free to assume that the number may lawfully be used for advertisements from that business, and not just for surveys, jokes, political statements or, indeed, blank pages (all of which are permitted under the TCPA).⁹

⁸ Our conclusion could well differ in the case of a directory intended, for example, only for use within an association of similar group and obtained by an outsider. Such directories, of course, or any directory for that matter, could carry a legend stating that the publication of a fax number does not indicate permission to send advertisements to such numbers.

⁹ The more difficult question is whether an unrelated business may obtain the fax number from the business receiving it and lawfully send an advertisement to that number.

As may fairly be deduced from the above, American Business Media strongly endorses the Commission's previous determination that a prior business relationship establishes the requisite consent to receive facsimile advertisements (see ¶ 39). The Commission further asks whether this prior ruling "has served to protect ongoing business relationships," to which American Business Media's response is a resounding "no." As explained above, the Commission's failure to promulgate an express regulation providing that an established business relationship equates to consent, but instead making such a finding only as part of a broad order dealing with numerous issues, has encouraged a well organized plaintiff's bar (with its own web sites) to ignore the finding or deem it unlawful. Therefore, American Business Media urges the Commission, as it suggests (739), *to* amend its formal rules to "expressly provide" for the established business relationship "exemption" *and to do so with a well-documented discussion of its authority for such action.*

The Commission also asks (739) whether a business that has an established business relationship with a customer "based on one type of product or service" should be allowed to send faxes related *to* other products or services. Once again, the ambiguities associated with a negative answer¹⁰ argue in favor of more speech, rather than less speech, especially since the recipient should be

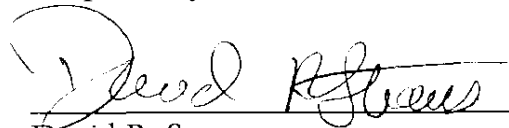
¹⁰ For example, with a strict limitation, could the publisher of a magazine dedicated to wall coverings send an advertisement promoting a wall coverings trade show! Is that a different product? What about seeking subscriptions to a new magazine dealing with flooring!

fully capable of easily terminating that relationship or limiting the range of permissible faxes with a simple phone call or return fax

Conclusion

With little debate and even less good information, Congress hastily enacted an overly broad, ambiguous and likely unconstitutional restriction on speech when it made unsolicited faxed advertisements unlawful. Far less intrusive measures (such as a "do not fax" list or time and page restrictions for the sending of faxed ads, as in the New York statute) could have been implemented, if any legislation was in fact called for. This Commission wisely determined that Congress could not possibly have intended to permit businesses to be sued by their own customers for sending such faxes, so it determined that the requisite consent arises from an existing business relationship. In reconsidering its regulatory approach, the Commission should do what it can to strengthen that finding and thus minimize the chilling effect on legitimate speech that the fax provision of the TCPA has created

Respectfully submitted,

A handwritten signature in dark ink, appearing to read "David R. Straus", written over a horizontal line.

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Dated: November 21, 2002